

Diamond Walnut Growers, Inc. and Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters, AFL-CIO. Cases 32-CA-13479 and 32-RC-3553

January 20, 1995

**DECISION, ORDER, AND DIRECTION OF
THIRD ELECTION**

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On June 21, 1994, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed limited exceptions and a supporting brief.¹ The Respondent and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

This case involves a second representation election,² which was held during an economic strike, and allegations that the Respondent engaged in objectionable conduct and committed various acts in violation of Section 8(a)(3) and (1) of the Act in the weeks leading up to the election which the Union lost. The judge dis-

missed the 8(a)(3) and (1) complaint allegations and overruled all election objections which were consolidated for hearing with the complaint.³ We reverse the judge and find that the Respondent violated the Act by its discriminatory treatment of three economic strikers in reinstating them to work just prior to the election. We further find that these violations, which encompassed the Union's Objection 11, warrant application of our usual policy, set out in *Dal-Tex Optical Co.*,⁴ of directing a new election when, as here, the unfair labor practices were committed during the critical period.

The Respondent operates a seasonal business receiving, processing, and marketing walnuts at its facilities in Stockton, California, where the Union has represented the employees for a number of years. The work force consists of regular year-round employees, supplemented by seasonal hires during the Respondent's peak season in September and October.

On September 4, 1991, 2 months after the expiration of the parties' most recent collective-bargaining agreement, the Union commenced an economic strike which, at the time of the events at issue here, was still in progress. The Respondent continued operations by hiring both year-round and seasonal permanent replacement employees.

On September 17, 1993,⁵ the Regional Director directed the instant second election be held on October 7 and 8. By letter dated September 20, the Union informed the Respondent that "[s]everal of the strikers share the Union's conviction . . . that a fair election is simply impossible at this point. Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers . . . have an opportunity to hear from Union sympathizers." Accordingly, the Union requested in its letter that four named economic strikers, including Willa Miller, be returned to work unconditionally. The next day the Union notified the Respondent that strikers Alfonsina Munoz and Mohammed Kussair also desired to return to work unconditionally.

The Respondent replied that all year-round employee positions were currently filled by permanent replacements and that seasonal positions were the only jobs available. Miller, Munoz, and Kussair, each of whom held year-round jobs before the strike, agreed to accept the seasonal jobs.

¹The Charging Party Union filed a motion to strike certain portions of the Respondent's brief in support of its limited exceptions which, according to the Charging Party, are beyond the scope of its limited exceptions. In light of our holdings here, we deny the Charging Party's motion.

²The first election in this case was set aside by the Regional Director by order dated September 17, 1993. The procedural history of the first election is set forth in fn. 3 of the judge's decision.

The second election at issue here resulted in an initial tally showing 310 for and 195 against the Union, with 635 determinative challenged ballots. Thereafter, in proceedings which involved two separate decisions by the Regional Director resolving the challenged ballots and the denial by the Board of requests for review filed by the Union and the Respondent to the Regional Director's first decision on challenges, a final revised tally was issued showing 475 for and 575 against the Union.

As to the objections filed by the Union to the second election, the Regional Director ordered Objections 2, 4, 8, and 11 consolidated with the complaint allegations for hearing before the judge, and overruled all remaining objections, including Objections 5 and 17. The Board, thereafter, granted the Union's request for review of the Regional Director's overruling of Objections 5 and 17. We discuss these two objections, *infra*, at fn. 15.

The Union has requested oral argument with respect to the issues raised by Objection 17. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³No exceptions were filed to the judge's overruling of the Union's Objections 2, 4, and 8 and these findings are adopted *pro forma*. Similarly, no exceptions were filed to the judge's failure to find that the Respondent violated the Act by delaying the reinstatement of strikers Shaw and Rosas or by condoning a physical attack by an employee on Union Organizer Macchello, and we adopt those findings *pro forma*.

⁴137 NLRB 1782 (1962).

⁵All dates hereinafter are in 1993 unless otherwise stated.

Miller was assigned as a casepacker in the Respondent's "cello" department, where she packed bags of walnuts into cartons for later shipment. Prior to the strike, Miller worked in the quality control department overseeing the work of "quality control assistants." At the time she applied for reinstatement, there were several quality control assistant openings which paid a higher hourly wage than the casepacker position to which she was assigned.

Munoz and Kussair were both assigned jobs as "crackers" in the growers inspection department where they cracked open walnuts for the purpose of determining the quality and price to be paid growers for their crop. Prior to the strike, Munoz was a lift truck operator and Kussair operated an air separator machine which vacuumed walnut shells and other debris off the walnut meats. Although both of these year-round positions were held by permanent replacements, seasonal positions as lift truckdriver and loader were available and paid more than the jobs which Munoz and Kussair were given.

In the first 2 weeks of his employment as a cracker, Kussair received from his supervisor, Lexie Whiteman, three separate oral warnings for not meeting a daily production quota of 17,000 grams of cracked walnuts. Whiteman testified that after she gave Kussair the third warning he became "very angry. He got into . . . in my face and was hollering." Whiteman reported the incident to Vince Brown, the director of human resources, who issued Kussair a written reprimand on October 1 for insubordination and inadequate production. Thereafter, Kussair requested a transfer to a loader position and the Respondent agreed; but, on October 7, the day before the transfer was to take place, Kussair left his job and went back on strike.

The second election was held as scheduled on October 7 and 8 at the Respondent's facility and at a neutral off-site location for striking voters. After casting their ballots, Miller and Munoz left their jobs and, like Kussair, rejoined the strike.

The judge's decision

The judge found that the controlling rule of law with respect to the issue in this case was stated by the Board in *Rose Printing Co.*:⁶

[A]n employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform.

Applying these principles, the judge found that Miller, Munoz, and Kussair were qualified for the positions of

quality control assistant, lift truckdriver, and loader, respectively, but because those positions were all seasonal jobs lasting only 8 to 10 weeks, the judge found that the positions were not substantially equivalent to the strikers' former jobs which were regular year-round positions. Accordingly, the judge concluded that under the above-stated principle of *Rose Printing* the General Counsel had failed to establish a prima facie case that the three strikers were discriminatorily denied those positions because he found that the seasonal jobs available were not substantially equivalent to their prestrike jobs and thus they were not entitled to the seasonal jobs. On this basis, the judge recommended that the complaint be dismissed.

The judge, however, made a further finding that if the Board rejected his finding and concluded that the General Counsel has established a prima facie case of discrimination against the returning strikers, then he would find that the Respondent violated Section 8(a)(3) and (1) of the Act because the Respondent failed to establish legitimate and substantial business justifications for placing the returning strikers in the jobs to which they were assigned. He based this alternative finding on the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co.*,⁷ which held that an employer's refusal to reinstate economic strikers after a strike violates Section 8(a)(3) and (1) unless it can be shown that the refusal was for "legitimate and substantial business justifications."⁸

Discussion

We find that the judge erroneously based his dismissal of the complaint on a theory which was neither alleged nor argued by the General Counsel. The General Counsel conceded in the complaint, as well as before the judge, that the seasonal jobs were not substantially equivalent to the strikers' prestrike jobs and thus the General Counsel never contended that the Respondent had an obligation under *Rose Printing* to reinstate the strikers to the seasonal jobs.⁹ Rather, the General Counsel relies on an alternative theory of unlawful discrimination, outlined in *Rose Printing* and overlooked by the judge, which states:

Our duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial

⁷ 389 U.S. 375 (1967).

⁸ We note that the judge's description of the Supreme Court's holding in *Fleetwood* is not entirely correct, but, in light of our holding below, we find no need to correct his error.

⁹ We express no opinion in this case on the Board's finding in *Rose Printing* that an employer has no obligation to reinstate strikers to available jobs that are not substantially equivalent to their prestrike positions.

⁶ 304 NLRB 1076 (1991).

equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs.* [Id. at 1078, emphasis added.]

As the Board specifically noted in *Rose Printing*, the General Counsel there did “not [litigate that] case on the theory that the [r]espondent refused to offer employees work in other jobs because of their status as former strikers.” Id. Here, the General Counsel did litigate the case on that theory, and we find that a prima facie 8(a)(3) violation was established and was not rebutted by the Respondent.

Thus, although the Respondent was under no legal obligation under *Rose Printing* to reinstate the strikers to jobs that were not substantially equivalent to their prestrike jobs, once it voluntarily decided to reinstate them, it was required to act in a nondiscriminatory fashion toward the strikers. The General Counsel contends that the Respondent failed to act in a nondiscriminatory fashion toward Miller, Munoz, and Kussair because in reinstating them it refused to place them in the positions of quality control assistant, lift truck operator, and loader, respectively, because of their union status and/or because of certain protected union activity they engaged in while on strike.

The Respondent admits that it refused to reinstate the strikers to these positions but contends that such refusal did not violate the Act because “it [was] more than justified [in] placing minor restrictions on their job assignment to protect [its] product, the plant and the employees.” Accordingly, the Respondent defends its conduct on the basis that it has satisfied the required burden under *Fleetwood* of showing “legitimate and substantial business justifications” for its actions.

In support of its *Fleetwood* defense, the Respondent emphasizes that from its inception and continuing through the events at issue here, the Union’s strike has been marred by a number of violent acts allegedly directed by the Union at replacement employees.¹⁰ In addition, the Respondent notes that during the strike the Union instituted an international boycott of its product, which included a bus tour around the country where leaflets were disseminated to the public which depicted the Respondent’s work force as composed of “scabs” who were packaging walnuts contaminated with “mold, dirt, oil, worms and debris.” According to the Respondent, these acts of violence, as well as the attacks on product quality and the integrity of the replacement employees, engendered the buildup of a considerable degree of hostility among these employees. Therefore, against this backdrop, the Respondent states that when it received the Union’s letter of Sep-

tember 20 offering, on the named-strikers’ behalf, to return to work, it decided against placing Miller in the sensitive position of quality control assistant where the final visual inspection of walnuts is made prior to leaving the plant. Given that she was an active participant in the boycott and bus tour where its walnuts were asserted to be tainted, the Respondent states that it could not risk placing Miller in that position where she would be provided “with an easy opportunity to let defective nuts go by undetected or to place a foreign object into the final product, thereby legitimizing the Union’s claims of tainted walnuts.” As to Munoz, who like Miller also traveled with the bus tour, the Respondent states that assigning her a lift truckdriver job was out of the question because in that position she not only could be confronted by hostile replacement employees if caught in an isolated area of the plant, but she would also have the same opportunity as Miller to damage its product by driving the 11,000 pound lift trucks in a careless manner. Finally, with respect to Kussair, although he was not actively involved in the boycott or accompanying bus tour, the Respondent states that a “conscious decision had been made to not place any of the strikers in positions as loaders” because the loader position is the “single most complained-about position in the entire plant . . . [and that it] knew full well that the Union would object” if Kussair were placed in that more “onerous” position. In any event, the Respondent states that even assuming it committed a violation for not giving him a loader job initially, it was later “remedied when the [Respondent] agreed to transfer Kussair” upon his request.

The judge rejected the Respondent’s defense. Assuming, arguendo, that a *Fleetwood* defense is applicable to the instant case, we reject it for the same reasons that he did. Thus, with respect to the violence committed against the replacement employees, which the Respondent contends raised the specter of replacement employees retaliating in kind against the strikers, there is no evidence that Miller, Munoz, or Kussair were involved in that conduct and, as the judge noted in his prior decision, “in most of the incidents the perpetrator is unknown.” 312 NLRB at 67. Furthermore, there is no specific evidence that any replacements harbored hostility toward these three strikers, and, if such evidence did exist as the Respondent claims, we fail to see how placing them in the positions to which they were assigned would lessen the perceived danger of retaliatory acts being committed against them.¹¹

¹⁰ The Respondent cites as evidence many of the same incidents detailed by the judge in a prior case involving these two parties. See *Diamond Walnut Growers*, 312 NLRB 61, 64–66 (1993).

¹¹ The Respondent contends that the jobs to which it assigned the strikers were more highly supervised than those to which they were refused reinstatement and, therefore, afforded the strikers more protection against violent replacement employees. In rejecting this contention, we note that the Respondent admitted that Munoz “freely roamed” the plant unsupervised during her breaks and that there is no evidence to indicate that Miller and Kussair did not similarly spend their breaktime unsupervised. Therefore, the potential for vio-

Under these circumstances, we find that the Respondent was not justified in restricting the strikers' job placements out of fear that the replacement employees would retaliate against *these* three strikers. Nor do we find that the Respondent's conduct was justified by the participation of Miller and Munoz in the boycott and circulation of leaflets disparaging the Respondent's product and work force. As the judge found, the strikers' conduct constituted protected Section 7 activity and there is no evidence indicating that such protection was lost because of threats made by Miller and Munoz to damage or sabotage the Respondent's equipment or products. Accordingly, we agree with the judge that the Respondent failed to establish legitimate business justifications for restricting the job placements of Miller and Munoz admittedly for union considerations.

We are similarly unpersuaded by the reasons given by the Respondent for Kussair's job placement. Although his circumstances differ from those of Miller and Munoz to the extent that he was not an active participant in the boycott or bus tour, he was a striker and the Respondent admits that it took that fact into consideration in deciding to assign him to the cracker position rather than to the loader job. However benevolent the Respondent claims its decision was, we find that it was nevertheless unlawfully discriminatory and was not justified by the fact that the loader job was comparatively onerous and shunned by most employees. Whether or not Kussair viewed the loader job this way was a decision for him to make, not the Respondent unilaterally. Because we find that Kussair's placement in the cracker position was unlawful, we further find, in agreement with the General Counsel and contrary to the judge's conclusion, that the reprimand he received while in that position was the product of the unlawful job assignment and, thus, was also a violation of Section 8(a)(3) and (1).

In sum, we find for the foregoing reasons that the Respondent's proffered *Fleetwood* defense lacks merit, and, thus, we find that by its failure to offer Miller, Munoz, and Kussair positions as quality control assistant, lift truck operator, and loader, respectively, the Respondent has violated Section 8(a)(3) and (1) of the Act.

Having concluded that the Respondent violated the Act in its discriminatory job assignments of the strikers, the question remains whether this conduct, which was committed during the critical period following the direction of election and which the Union included as a timely filed election objection, warrants setting aside the election. We find that it does. As noted above, our usual policy under *Dal-Tex Optical Co.* is to set aside an election whenever unfair labor practices are committed during the critical period, because such conduct

"is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." 137 NLRB at 1786-1787. Although it is true, as the Respondent notes, that an exception is made to this policy when it is virtually impossible to conclude that the violations have affected the election results,¹² we do not find that exception applicable here. Unlike the two cases cited by the Respondent which both involved 8(a)(1) conduct affecting only a small number of employees relative to the size of the bargaining unit,¹³ the conduct here involved serious violations of Section 8(a)(3) in which employees were denied jobs solely because of their protected strike activity, while at the same time being placed in positions that were among the lowest paying in the plant. Although the bargaining unit here is substantial, numbering almost 1300 employees, 8(a)(3) violations, as the Board stated in *Baton Rouge General Hospital*,¹⁴ are "by their nature, not fleeting in their effects, and they are unlikely to escape the notice of fellow employees." 283 NLRB at 192 fn. 5. The Respondent's discriminatory treatment of these three employees was particularly likely to come to the attention of fellow employees in this case in view of the fact that the three discriminatees were sent back into the unit for the express purpose of communicating the Union's message to the unit employees. It was unlikely to escape notice by the unit employees that the Respondent did not look with favor on employees who chose to take such a leading role on behalf of the Union. We further note that the violations occurred close in time to the election.

On balance, therefore, in light of the seriousness of the violations and their timing, we find that the election should be set aside.¹⁵

¹² See, e.g., *Clark Equipment Co.*, 278 NLRB 498 (1986).

¹³ *Clark Equipment Co.* (8 employees affected in a unit of over 800); *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (2 employees affected out of a unit of 106).

¹⁴ 283 NLRB 192 (1987).

¹⁵ In light of the finding that the election should be set aside based on the 8(a)(3) violations found above, we find it unnecessary to pass on the Union's Objection 5. Further, Members Browning and Truesdale find it unnecessary to pass on the Union's Objection 17 regarding the Regional Director's failure to conduct a mail ballot election. However, they note that it may well be within the Regional Director's discretion to conduct a mail ballot election, in whole or in part.

Chairman Gould would sustain the Union's Objection 17 and find that the Regional Director's failure to conduct a mail ballot election in this case also warrants setting aside the election. In this regard, he notes that prior to the second election the Union requested that it be conducted by mail ballot because many strikers had temporarily relocated to distant locations to find interim employment and would be unable to get to the polls to vote. He finds mystifying and meritless the Respondent's contention that this prediction by the Union about the need for a mail ballot has become moot by the fact that the Union lost the ensuing election by a margin of 100 votes and that the Union could point to only 35 strikers whom it could not contact prior to the election. The relevant fact here is not that the Union contacted all but 35 strikers, but rather that, according to

Continued

lence against the strikers by the replacements existed even in the jobs to which they were assigned.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the position of quality control assistant, lift truckdriver, and loader, respectively, and to make them whole for the loss of earnings and benefits that they have suffered as a result of the discrimination against them.¹⁶ Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to Kussair's unlawful reprimand and to notify him that this has been done and that this unlawful action will not be used against him in any way.

ORDER

The Respondent, Diamond Walnut Growers, Inc., Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the seasonal positions of quality control assistant, lift truckdriver, and loader, respectively, because of their union status or their union activities.

(b) Reprimanding employees for their failure to maintain job standards while performing in positions which they were unlawfully assigned.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Miller, Munoz, and Kussair immediate and full reinstatement to the seasonal positions listed above and make them whole for the loss of earnings and benefits they have suffered as a result of the discrimina-

the final election tally, approximately 135 eligible employees failed to vote. Under these circumstances, where the Union advised the Regional Director that strikers would be unable to reach the polls and where a significant number of eligible voters, in fact, did not vote, he finds that the Regional Director abused his discretion by denying the Union's request for a mail ballot election. *Shepard Convention Services*, 314 NLRB 689 (1994).

¹⁶ We leave to the compliance stage of this proceeding the Respondent's contentions that its backpay liability with respect to the three strikers is tolled as of the date they rejoined the strike, or, in the case of Miller, that her backpay is tolled on the day she reported in sick, and that Kussair's backpay is tolled on the day his request for a loader position was granted.

tion against them, in the manner set forth in the remedy section of this Decision.

(b) Remove from its files any reference to Kussair's unlawful reprimand and notify him in writing that this has been done and that this reprimand will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of this Order.

(d) Post at its facility and place of business in Stockton, California, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on October 7 and 8, 1993, in Case 32-RC-3553, is set aside and that this case is severed and remanded to the Regional Director for Region 32 for the purpose of conducting a new election.

[Direction of Third Election is omitted from publication.]

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to offer Willa Miller, Alfonsina Margaret Munoz, and Mohammed Kussair reinstatement to the positions of quality control assistant, lift truckdriver, and loader, respectively, because of their union status or their union activities.

WE WILL NOT reprimand employees for their failure to maintain job standards while performing in positions which they were unlawfully assigned.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Miller, Munoz, and Kussair reinstatement to the seasonal positions listed above and WE WILL make them whole, with interest, for the loss of earnings and benefits they have suffered as a result of the discrimination against them.

WE WILL remove from our files any references to Kussair's unlawful reprimand and notify him in writing that this has been done and that this unlawful action will not be used in any way against him.

DIAMOND WALNUT GROWERS, INC.

JoEllen Marcotte, Esq., for the General Counsel.

Robert G. Hulteng and Robert Leinwand, Esqs., of San Francisco, California, for the Respondent.

Kenneth C. Absalom, Esq., of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Stockton, California, on March 23, 24, 25, and 28, 1994,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 32 on January 26, 1994. In addition, on February 2, 1994, the Regional Director ordered consolidated certain issues arising from a representation election in Case 32-RC-3553. The complaint, based on a charge filed on October 4, by Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters (the Union), alleges that Diamond Walnut Growers, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.²

The Union's representation petition was filed on April 17, 1992, and sought a representation election among certain of Respondent's maintenance, production, and warehouse employees. A second election was held pursuant to a Third Supplemental Decision and Direction of Second Election issued on September 17.³ Timely objections to conduct affecting the

outcome of the election were filed by the Union. In addition, it appears from the tally of ballots that 635 votes were challenged, and they are sufficient in number to affect the outcome of the election.⁴

Issues

I. Whether Respondent, through its agents and/or supervisors, committed one or more of the following acts which interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and/or because of the employees status as strikers or returning strikers and because of their other protected concerted activities:

(a) Witnessed an attempted assault on a union agent by a Respondent employee and condoned such act by taking no action against the employee, notwithstanding its policy of prohibiting assaults in the workplace.

(b) Delayed for 3 days in restoring striker Dorothy Shaw and Hector Rosas to available positions of employment.

(c) Declined to place certain returning strikers in the following available positions of employment: Willa Miller as quality assurance assistant; Alfonsina Munoz as lift truck operator; and Mohammed Kussair as loader.

(d) Verbally reprimanding Kussair and making a written record of the verbal reprimand.

II. Whether Respondent, through its agents and/or supervisors, engaged in certain conduct prior to the second election and to which the Union filed timely objections, and if any such conduct occurred whether a third election is warranted.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Charging Party, and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the processing, nonretail sale, and distribution of walnut products and having an office and place of business located in Stockton, California. It further admits that during the past year, in the course and conduct of its business, it has sold and shipped goods or provided services valued in excess of \$50,000 directly to customers located outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

no exceptions to the hearing officer's report. Thereafter, the Regional Director ordered that a second election be conducted (G.C. Exh. 2(c)).

⁴ According to the tally of ballots, there were approximately 1283 eligible voters, out of which 310 cast ballots for and 195 against the Union (G.C. Exh. 3(a)). No issue regarding the challenged ballots is before me.

¹ All dates refer to 1993 unless otherwise indicated.

² Without objection and prior to hearing, the General Counsel amended the complaint in certain particulars (G.C. Exh. 4).

³ The first election by secret ballot was conducted on August 11 and October 8 and 9, 1992. Out of approximately 1301 eligible voters, 240 cast ballots for, and 8 cast ballots against the Union. There were no void ballots, and 942 challenged ballots which were sufficient in number to affect the results of the election. On February 3, a supplemental decision on challenged ballots was issued in which the majority of the challenges were overruled. On April 6, a revised tally of ballots showed that of approximately 1301 eligible voters, 1190 ballots were cast, and 366 cast ballots for and 592 cast ballots against the Union. The Union thereafter filed timely objections to the election. On September 3, a Board hearing officer issued her report finding merit to four of the Union's objections. The Employer filed

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Cannery Workers, Processors, Warehousemen & Helpers Local 601, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For a number of years prior to 1991, Respondent and the Union have maintained a collective-bargaining relationship. The last agreement between the parties began on July 18, 1988, and expired on June 30, 1991. On or about September 4, 1991, all or most of Respondent's bargaining unit employees ceased work and engaged in an economic strike. There followed extensive litigation in state and Federal courts and before the Board⁵ with respect to issues related to and generated by the strike. As of the hearing of the instant case, the labor dispute was continuing.

Respondent's business is seasonal, although it employs a number of year-round employees. While the season varies from year to year depending on the timing of the walnut crop, in general the peak walnut season begins in approximately the first week in September and continues through the last week in October. During the season, Respondent's managers and supervisors work 12 to 14 hours per day, 6 or 7 days per week. Operations continue around the clock with 50 or more truckloads of walnuts per day being delivered. Respondent's facilities consist of about 55 acres with about 1 million square feet under one roof.

Broken down to its simplest and basic parts, Respondent's operations consist of receipt of the walnuts, initial inspection to assess the quality, to weigh, and to compute payment for the crop, more detailed inspection to look for fungus, insect infestation, or other defects, packaging and packing into boxes. Some product is then temporarily stored in coolers on the premises while other product is shipped out to customers all over the United States and worldwide.

Since the strike began just as Respondent's 1991 season was beginning, two other seasons have come and gone and another is fast approaching. With most of Respondent's long-time employees continuing the strike, Respondent has relied on permanent replacement employees to perform the work. Under the circumstances, it is not surprising that conflict developed between the replacement workers and the strikers. This conflict had abated since the beginning months of the strike, but then increased to some extent in the weeks before the second election. The replacement workers feared that a union-election victory might result in loss of their jobs while strikers resented their own apparent job loss and the failure of Respondent to settle strike-related issues with the Union.

B. Analysis and Conclusions

1. Unconditional offers by a few strikers to return to work

a. The facts

On September 20, Respondent's managers received a phone call from a guard at the main gate. A number of strik-

ers accompanied by a union official named William Freitas who did not testify were asking to be allowed into the plant in order to make an unconditional offer to return to work. After the delegation was allowed into the premises, they were escorted to a meeting with Vince Brown, Respondent's director of human resources and Respondent witness, and with Wendy Heinze, Respondent's supervisor of recruiting, compliance, and compensation and Respondent witness. For the Union, Freitas represented himself to be a union official of the Teamsters Union and an aide to Ron Carey, president of I.B.T., rather than an official of the Local. With Freitas, were three long-time employees, who had joined the strike from the beginning, and who were well known to Brown and Heinze; they were Willa Miller, Cynthia Zavala, and Charlotte Loveday. Of this group, Miller testified in the General Counsel's case-in-chief, Loveday testified for the General Counsel in rebuttal, and Zavala did not testify. Most of what occurred at the meeting is not disputed.

All agree that the union delegation appeared at the plant gate in the morning hours without prior notice to Respondent. All agree that a 15-to 30-minute meeting ensued with Brown and Heinze.

Freitas began the meeting by tendering to Brown and Heinze a letter which reads as follows:

September 20, 1993
Robert Hulteng
Littler, Mendelson, Fastiff,
Tichy & Mathiason
650 California St., 20th Floor
San Francisco, CA 94108
Vince Brown
Director, Industrial Relations
Diamond Walnut Growers, Inc.
1050 S. Diamond St.
Stockton, CA 95205

Re: Unconditional Offer to Return to Work

Dear Mr. Hulteng and Mr. Brown:

After extensive hearings concerning Diamond Walnut's conduct during the 1992 representation election, the NLRB Hearing Officer found that the Employer engaged in illegal campaigning which adversely affected the outcome of that election. This objectionable conduct included misleading and threatening the replacement workers as well as offering them improper financial inducements to win over their votes. Despite what must be an enormous expenditure of legal fees by the Employer to defeat the Union, the Employer's efforts have failed.

Unfortunately, because of the Employer's violation of the National Labor Relations Act, all parties must now incur additional costs to rerun the election.

Several of the strikers share the Union's conviction that because of Diamond management's blind determination to break the Union, no matter what the cost to the long-term employees, the Growers and the public, a fair election is simply impossible at this point.

Nevertheless, because a rerun election is to be held, these employees feel that it is important that the replacement workers, many of whom were last year summarily terminated within a few days after voting, have

⁵ See, e.g., *Diamond Walnut Growers*, 312 NLRB 61 (1993).

an opportunity to hear from Union sympathizers, an opportunity denied them last year because few worked with them or attended the mandatory employee meetings in which management personnel campaigned.

Accordingly, the strikers listed below have decided to cease their strike-related activities and have authorized me to inform you that effective upon delivery of this letter, they are available and willing to return to immediate active employment. This unconditional offer to return to work is made on behalf of the following employees, each of whom will be present in person and ready to work when this letter is delivered at the Employer's premises.

Name	Contact Telephone No.
Charlotte Loveday	931-0237
Willa Miller	464-4075
Art Torres	941-9207
Cynthia Zavala	948-4009

Although these employees have decided to work without condition, the Union has asked me to remind you that Section 7 of the National Labor Relations Act prohibits the Employer from discriminating or retaliating against employees who have been on strike, or in any other way interfering with an employee's right to engage in Union activities. The Union expects the Employer to respect these rights and to treat these returning workers fairly.

Very truly yours,
s/ Kenneth C. Absalom
Kenneth C. Absalom

pc: Lucio Reyes

[G.C. Exh. 7.]

After receipt of the letter, Brown explained that the returning strikers would have to follow the same procedure followed for previous returning strikers (crossovers). That is they would have to sign a form drafted by the Respondent indicating, in terms acceptable to the Company, their desires to return to work (see form, G.C. Exhs. 19 and 20). Freitas examined the form and then consulted privately by telephone with someone. A few minutes later, Freitas returned and stated he would need to consult further with legal counsel, but would get back to Brown and Heinze later. Freitas then left with the three strikers and the company form. Later in the afternoon, Respondent received by courier three executed forms from the strikers who had been present. The Union had made certain changes to the company form, to which Respondent officials did not object. Ultimately the three strikers and four others as well returned to work for what turned to be a brief period.⁶

Both Brown and Heinze testified that during this initial meeting, Freitas instructed them that any communication between the Company and the returning strikers must go through the Union, and that the strikers would communicate with the Company in the same way. Neither Brown nor

⁶Art Torres is mentioned in the Union's letter recited above. Torres never returned to work and no issue in this case concerns him.

Heinze objected to this procedure. Loveday was called in rebuttal to deny that Freitas had ever made such a statement.

I credit Brown and Heinze on this point. Because Freitas was never called as a witness to testify to what he said, nor was his absence explained, I draw an adverse inference on this credibility issue. *Douglas Aircraft Co.*, 308 NLRB 1217 fn. 1 (1992), and *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. 110 CCH LC Sec. 10872 (D.C. Cir. 1988). Moreover, I note that in a letter of September 20, sent by Respondent Counsel Hulteng to the Union Counsel Absalom, there is a reference relative to this issue: "Because these strikers have elected to communicate through you, we are responding to you rather than to the strikers directly." (G.C. Exh. 8, p. 2.) Hulteng again referenced the Union's desired method of communication with strikers in a September 22 letter to Union Official Lucio Reyes. (G.C. Exh. 10.) There is no evidence that the Union challenged Hulteng's assertions as misstatements.

In his letter of September 20, Hulteng went on to reiterate what Brown had stated at the meeting with Freitas earlier that day, "The Company had no available regular positions at this time." However, the three returning strikers had agreed to accept seasonal positions which were available. More about this will follow.

On September 21, the Union notified Respondent by letter that three more strikers desired to return to work: Alfonsina Munoz, Mohammed Kussair, and Linda Acevedo (G.C. Exh. 9). Munoz and Kussair testified for the General Counsel, but Acevedo, like Torres, never returned to work, never testified, and played no role in this case. On September 22, Hulteng notified the Union by letter that again only seasonal positions were available and that the strikers were to report for work on September 23 at 7 a.m. (G.C. Exh. 10).

On September 23, the Union notified Respondent by letter that two more strikers, Dorothy Shaw and Hector Rosas, desired to return to work (G.C. Exh. 11). To this offer, Hulteng wrote back on September 24 that no positions, seasonal or regular, were available at that time, but that the two employees would be placed on a preferential rehire list for seasonal positions (G.C. Exh. 12). On September 30, Brown notified the Union by "fax" that seasonal positions had opened up for Shaw and Rosas and that they were scheduled to report for work on October 1, at 6 a.m. (G.C. Exh. 13).

On October 7, Miller, Munoz, and Kussair gave written notice that they were resuming the strike (G.C. Exhs. 15, 16, and 18).

b. Applicable legal principles

In *SKS Die Casting*, 294 NLRB 372, 375 (1989), the Board stated the following applicable legal principles:

In *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980), a case in which the respondent violated Section 8(a)(3) by failing to reinstate economic strikers following their unconditional offer to return to work, the Board stated:

Certain principles governing the reinstatement rights of economic strikers are by now well settled. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage

employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:

"The underlying principle in both *Fleetwood* and *Great Dane*, supra, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed."

235 NLRB at 1238. See also *Laidlaw Waste Systems*, 313 NLRB 680 (1994).

Returning economic strikers must be reinstated to their former positions, or to those which are substantially equivalent. *Rose Printing Co.*, 304 NLRB 1076 (1991). Compare *NLRB v. Aluminum Cruiser, Inc.*, 620 F.2d 116, 117-118 (6th Cir. 1980). "An employee retains his right to reinstatement until he receives the same job or one substantially equivalent to it . . . even if in the interim, he accepts a lesser or different position from the employer." *Webb & Co. v. NLRB*, 888 F.2d 501, 503-506 (7th Cir. 1989); *Providence Medical Center*, 243 NLRB 714, 744 (1979).

Respondent does not contest any of the above legal principles, nor the preliminary conclusions reached above. It accepts its burden of proof under the *Fleetwood* case to show a legitimate and substantial business justification. I turn back to the record to consider Respondent's arguments and additional facts from the record.

(1) Willa Miller

This witness testified for the General Counsel as follows: She is 55 years of age and has worked for Respondent as a year-round employee since 1961. She joined the strike 1 week after it began only because she had been on vacation for that first week, and has continued on strike ever since except for the time she returned to work with union approval prior to the second election. For the 7 to 8 years prior to the strike, Miller worked as a quality control supervisor, which is a bargaining unit position. In that position, she supervised the work of seven to eight quality control assistants, which was her job for about 10 years before she became supervisor. As supervisor, Miller also trained the quality control assistants.

Upon her return to work on September 22, Miller was assigned a job as a packer in the "cello" department. As a packer, Miller received off a production line, 1-pound bags of walnuts packaged in cellophane bags and then packed 40

bags to a box, a task which took between 1 or 1-1/2 minutes. When the box was full, Miller was required to push the box along a conveyer to another conveyer belt where the box was then transported mechanically to another station. Miller performed this work for 2 days and then called in sick claiming her back was hurting her. In 1983, Miller had hurt her back at work and had signed-off⁷ any plant job requiring lifting over 25 pounds. The packing job in issue here required no lifting, only the pushing of the box when full. In 1973, Miller had signed-off any job as casepacker. However, such restrictions are valid for only 24 months. When Miller was assigned a job as a casepacker, she made no protest, filed no grievance, or claimed any physical impairment.

The parties stipulated at hearing that when Miller returned to work there were one or more job openings for the position of quality control assistant, that Miller was qualified to work in this position, and that if Miller had received the position, she could have remained in that job at least through October 7. It was also stipulated that the job of quality control assistant pays 32 cents per hour more than the job of casepacker.⁸ (Tr. 142-145.)

Respondent called as a witness David Pedro, Miller's manager before the strike. He testified that the job of quality control assistant is important because these employees must inspect and grade the walnuts for color, defects, mold, insect damage, and other foreign material before the walnuts are packaged for shipment. He also testified that based on Miller's work before the strike Miller was a capable, competent, and well-trained supervisor.

(2) Alfonsina Margaret Munoz

Munoz began working for Respondent as a seasonal employee in 1973. About 1981, she became a year-round employee. For approximately 11 to 12 years before the strike, Munoz worked in the carton warehouse as a forklift operator. In order to perform her job, Munoz had to travel all over the plant delivering packaging supplies and performing other duties. During the season, Munoz had little or no supervision. A plant manager named Howard Dickens testified for Respondent that a forklift weighed about 11,000 pounds and was capable of causing great damage to plant equipment or facilities if its driver so intended or was negligent in its operation. A driver of a forklift could also drive it into remote corners of the plant where few employees work. Although Dickens was not Munoz's immediate supervisor, he was the next level of supervision after Munoz's supervisor. To his knowledge and no evidence in the record contradicted his testimony, Munoz never was disciplined for operation of the forklift and overall she had a good work record.

When Munoz returned to work on September 23, she was assigned to work in growers inspection, the first inspection step in the process described above. Again the parties stipulated at hearing that as of the date Munoz returned to work, there was one or more lift truckdriver positions available and that if Munoz had been placed in that position, Munoz could

⁷ The terminology "signed-off" means that Miller had completed Respondent's personnel form by which she eliminated herself from consideration for any lifting job of 25 pounds or more.

⁸ In formulating the final stipulation, the parties sometimes referred to "quality assurance assistant," or "quality control assistant." The job titles refer to the same job.

have remained a forklift driver until she left to resume the strike. The parties also stipulated that Munoz was qualified as a lift truck operator, that seasonal lift truck operators are paid between \$7.75 and \$10 per hour, depending on experience, and that for her production work in grower's inspection, Munoz was paid \$5 per hour (Tr. 200–201).

The evidence showed that Munoz performed her work in growers inspection in a room about 30 by 30 feet which contained six benches apparently set up on both sides of a long table. About 45 to 50 employees worked cracking open the walnut shells and inspecting the contents. On break periods and during lunch, Munoz was allowed to roam in and around the plant without restriction in order to campaign for the Union.

(3) Mohammed Kussair

This witness started working for Respondent in 1981 as a year-round employee. Prior to the strike Kussair worked as an air operator in the bulk storage department.⁹ Like Munoz, Kussair was assigned a job in grower's inspection when he returned to work on September 23. Kussair testified that he had a comfort problem doing the work sitting down for 8 hours. He also had a comfort problem standing up, as due to his height, his head touched the overhead light. This witness experienced conflict with his supervisor, Lexie Whiteman, a witness for Respondent, over Kussair's alleged low production. On or about September 30, Kussair requested a job as a loader, a job much more physically demanding than the production job to which Kussair was assigned.

The parties stipulated that when Kussair returned to work, one or more loader positions were available and if Kussair had been placed in a loader position as of the date he returned to work, he could have retained the job through the entire time of employment (Tr. 232). The parties also stipulated that the loader job paid \$6 per hour while the production job paid \$5 per hour.

In the instant case, I find that the General Counsel failed to establish a prima facie case of unlawful discrimination with respect to returning strikers Miller, Munoz, and Kussair. Miller was qualified to perform the job of quality control assistant; Kussair was qualified to perform the job of loader and Munoz was obviously qualified to perform the job of lift truck operator which was the job she held when she went on strike. However, as the Board held in *Rose Printing Co.*, supra at 1076, "an employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform."

I note further that the Board in *Rose Printing Co.*, cited with approval two other cases which are applicable to the instant case. In *New Era Electric Corp.*, 217 NLRB 477 fn. 1 (1975), the Board noted that the disputed poststrike position involved substantially lesser pay and would have en-

tailed working under the charge of an employee in the striker's former job. Accordingly, the Board found it to be non-equivalent to the striker's former job. In the instant case, Miller, a former quality control supervisor, would have had to work for a lesser rate of pay, under the supervision of an employee in Miller's former job now apparently filled by a permanent replacement employee.

The Board in *Rose Printing Co.*, also cited the case of *Certified Corp.*, 241 NLRB 369 (1979), for the proposition that a "part-time temporary job . . . cannot be characterized as 'substantially equivalent' to any job formerly held by any strikers since the strikers were all employed on a regular full-time basis." In the instant case, all jobs in issue—the ones the strikers were assigned to and the ones General Counsel claims they should have received were "seasonal," lasting for 8 to 10 weeks. I conclude therefore as the Board did in *Rose Printing Co.*, supra at 1078–1079, "Acceptance of the General Counsel's argument would mean that a striker would have two reinstatement rights and that employer would have two correlative obligations." One is reinstatement to any job which the striker is qualified to perform, even if not the same or substantially equivalent to the striker's prestrike position. Then when the striker's former job or a substantially equivalent one became available, the striker would have a right to transfer to that job. Because Federal labor law does not provide such a two-step process, I find that Miller, Munoz, and Kussair, all full-time, year-round employees, were not entitled to seasonal jobs as quality control assistant, as lift truck operator, or as loader, respectively. Accordingly, I will recommend to the Board that this segment of the case be dismissed.

c. Alternative findings

If the Board finds that General Counsel has established a prima facie case of discrimination against the returning strikers, then I would find that Respondent violated Section 8(a)(1) and (3) of the Act because I also find that Respondent has failed to establish legitimate and substantial business justifications for placing the returning strikers in the jobs to which they were assigned. I begin my analysis here by rejecting Respondent's suggestion (R. Br. 27, fn. 20) that because the Union never filed a grievance nor did any of the strikers immediately ask to be transferred to different jobs, there could be a waiver of the striker's rights. It is the Respondent's burden to show a legitimate and substantial business justification and neither the Union nor the strikers are obligated to put the Respondent on notice that it should follow the law.

In *NLRB v. Fleetwood Trailer*, supra at 376, the Court gave two examples of when legitimate and substantial business justifications for refusing to reinstate striking employees have been recognized: When the jobs are occupied by permanent replacements and when the striker's job has been eliminated for substantial and bona fide reasons, other than considerations relating to labor relations. I will assume without deciding that the Court did not intend to limit the application of the defense to the two examples cited in the opinion.

When the strikers gave first notice of their unconditional offer to return to work, the union counsel provided Respondent with General Counsel's Exhibit 7, which I have recited above. In addition, as found above, Freitas told the Employer's representatives, Brown and Heinze, that all communica-

⁹Kussair's job is a bid job also called a rated job. This means that qualified employees must bid to obtain these jobs. By contrast, there are four nonrated (unskilled) jobs which generally pay less than the rated positions: loader, production worker, case packer, and laborer. The grower's inspection jobs are considered nonrated production jobs.

tion with the strikers should go through the Union. Based on these facts in the context of surrounding facts and circumstances, I will assume for the sake of argument that the returning strikers were agents of the Union. See *Allegany Aggregates, Inc.*, 311 NLRB 1165 (1993); *Millard Processing Services v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993).¹⁰

Respondent presented evidence that the Union was urging a boycott of Respondent's products (R. Exh. 2). In addition, the Union was circulating handbills stating in part, "Diamond management appears to be looking the other way while scabs package walnuts with mold, dirt, oil, worms and debris." The public (including Respondent's customers) is again urged to "Boycott Diamond Walnut" (R. Exh. 3). Respondent also presented evidence that the Union and its agents traveled on a bus to selected cities around the country, seeking to publicize the strike and to create support for it and urging the public to boycott Respondent's products (R. Exhs. 18-20).¹¹

Some of the Union's circulars are the subject of a state court libel action, and I express here no opinion whatsoever on any issue in that litigation. The only issue here is whether the Respondent had a legitimate and substantial business justification for assigning the strikers to the jobs they did. Both Miller and Munoz admitted knowledge of the Union's circulars and involvement with their distribution. Both Dan O'Connell, Respondent's vice president of operations, and Brown testified that in assigning jobs to returning strikers, they considered both the safety of the returning strikers and that of the replacement employees, the possibility that the strikers could sabotage the product or intentionally damage equipment, or otherwise cause mischief to Respondent's prejudice.

In considering Respondent's position, I note the following: there is no evidence that the Union nor any of the returning strikers had made threats against replacement workers nor threats to damage or sabotage equipment or products.¹² At

¹⁰ That the agency status of the returning strikers cannot be considered controlling in my analysis is shown by the Board's decisions in *Willmar Electric Service*, 303 NLRB 245 (1991), enfd. 968 F.2d 1327 (D.C. Cir. 1992), cert. denied 113 S.Ct. 1252, and its progeny. In *Willmar Electric*, the Board held that an applicant for employment who was employed by the union at the time of the application and who planned to continue some kind of employment affiliation with the union, was nevertheless an employee within the meaning of Sec. 2(3) of the Act. Despite some conflicting decisions in the court of appeals, see *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *Ultrasytems West Constructors v. NLRB*, 145 LRRM 2641 (4th Cir. 1994), the Board has continued to adhere to its view that there is no conflict of interest if an employee of the union seeks employment with a company to organize employees. See, e.g., *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Town & Country Electric*, 309 NLRB 1250 (1992); and *Ultrasytems West Constructors*, 310 NLRB 545 (1993).

¹¹ Respondent also presented incident reports and even testimony from a prior Board case involving Respondent, 312 NLRB 61 (1993), reflecting threats, assaults, and vandalism by some strikers against some nonstrikers (R. Exhs. 22-25). All or most of this evidence relates to events in the early days of the strike. I assign little weight to it. As to R. Exh. 20, a particularly graphic boycott handbill, the Union denies any involvement with its preparation or distribution and I assign no weight to it at all.

¹² As noted above, the threats or acts of violence committed by other strikers had long since abated. Moreover, even if Respondent had evidence of misconduct against these strikers, it could be argued

page 31, footnote 21 of its brief, Respondent cites the case of *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, for the proposition that Miller and Munoz had engaged in disloyalty and product disparagement by circulating materials during the bus tour and at other times urging a boycott of Respondent's materials and asserting that Respondent's product is contaminated.

In *Sierra Publishing Co. v. NLRB (Sacramento Union)*, 889 F.2d 210 (9th Cir. 1989), enfg. 291 NLRB 540 (1988), the court stated as follows:

[T]he disloyalty standard is at base a question of whether the employees' efforts to improve their wages and working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases where the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.

In this case, where long-term newspaper employees had accepted pay cuts because the paper claimed financial difficulty, where negotiations had continued for a long time with no results, and where the letter in question [mailed to 50 of the employer's main retail advertisers] was directly and overtly related to labor dispute and disclosed no significant confidences, there is substantial evidence to support the Board's finding that the means chosen by the employees were not so unreasonable as to lose Section 7 protection on grounds of disloyalty.

At page 216 of its opinion in *Sierra Publishing Co.*, the court cited *Allied Aviation Service*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980). There, the Board found that the employer had unlawfully suspended and discharged an employee for engaging in protected Section 7 activities. As the Board stated, the employee, "in seeking outside assistance [in letters to the employer's customers], chose to emphasize the safety aspects of the two ongoing disputes." The Board found that "[a]lthough the ongoing dispute . . . had not arisen strictly on safety grounds, we cannot say that the safety aspects . . . were not part of or were unrelated to the disputes." Further, the Board noted (*supra* at 231):

that it waived any rights it may have had with respect to said striker misconduct by returning the strikers to work. This is an issue I need not decide here.

In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. . . . [W]e have previously held that, absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of [the employer] to his choice of forum. . . . [W]e find nothing in the letters which rises to the level of public disparagement necessary to deprive otherwise protected activities of the protections of the Act.

Similarly, in *Mitchell Manuals*, 280 NLRB 230 (1986), the Board found "nothing" in the "language" of the employees' letter to the chairman of the employer's parent corporation "sufficiently opprobrious, defamatory or malicious . . . to remove the employees from the protection of the Act." The Board noted (*supra* at 231):

Although the employees' message is couched in terms of criticism of [the employer's] operations, the thrust of the letter is the employees' proposal for increasing the professionalism of their jobs. . . . Moreover, we reject the . . . contention that the . . . letter is unprotected as it contains statements which are false, as there is no evidence that, if false, they are deliberately or maliciously false, and it is well settled that falsity of a communication does not necessarily deprive it of its protected character.

And, in *Emarco, Inc.*, 284 NLRB 832 (1987), the Board also found that the employees' "remarks" were not "malicious falsehoods," they "were not in the nature of a personal attack unrelated to the employees' protest of [the employer's] labor practices"; and "to the extent the . . . remarks reflect bias or hyperbole . . . in the context of an emotional labor dispute clearly identified as such . . . they cannot be said to be so disloyal, reckless or maliciously untrue as to lose the Act's protection."

The Board, applying the above principles in *Cincinnati Suburban Press*, 289 NLRB 966 (1988), similarly found that the employer newspaper violated Section 8(a)(1) and (3) of the Act when it suspended and discharged an employee because he wrote and published an article in another publication entitled "Dirty Tricks In The Newsroom." The Board agreed that the employee's article was "inextricably entwined" with ongoing union activities, noting (*supra* at 967):

Even though an employee may be acting alone, an employee attempting to form, join or assist a labor organization is nevertheless protected by Section 7 of the Act. . . . [Further, the] article was not so disloyal, reckless or maliciously untrue so as to lose the Act's protection. Although the [employer] argues that . . . [the] article [was] inaccurate, it has failed to show any evidence of malice or recklessness on [his] part.

The Board also noted (*Id.* at 968):

In contending that [the employee's] conduct was unprotected, the [employer] relies heavily on the sentence in [the] article that, "One effort at persuasion by execu-

tive editor Doug Sandhage would have been laughable had it not indicated an insidious disregard for the truth." The [employer] argues that this sentence impugned its integrity and the truthfulness of its newspapers. It is clear, however, that the reference to Sandhage in the article related solely to and was in the context of reciting management's opposition to the union, and it neither disparaged Sandhage's personal integrity or truthfulness with respect to the publication of the newspaper nor disparaged the integrity or truthfulness of the [employer's] products, the publication of a newspaper generally. In these circumstances, we conclude that [this] reference . . . was not such as to forfeit the protection of Section 7.

See also *Springfield Library & Museum*, 238 NLRB 1673 (1979), where the Board noted:

Specificity and/or articulation are not the touchstone of union or protected activity. Rather, the issue to be addressed is the question of whether or not the comments are related to concerted or union interests. Once the concerted nature of the words is established . . . respondent ha[s] the burden to show that the words were published with the knowledge of their falsity or with a reckless disregard of whether they were true or false.

As a result of the cases and discussion above, I conclude that the statements made by strikers or the Union representing them in the instant case are linked to the labor dispute in question. Furthermore, the fact that they may be biased or contain hyperbole does not render them unprotected. Rather, so long as the statements in question are not malicious in character, they are protected. *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978)(and cases cited therein), *enfd.* 600 F.2d 132 (8th Cir. 1979); *Texaco Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir. 1972), *cert. denied* 409 U.S. 1008 (1972). The burden is on the Respondent to establish that a striker's statements are false and malicious in order to justify denying the employee's reinstatement. See *American Hospital Assn.*, 230 NLRB 54, 56 (1977), and cases cited therein.

Assuming without finding that the above authorities are applicable to the instant case where the issue is not whether a particular striker has committed misconduct so serious as to preclude reinstatement at all, but rather where the issue is whether the Respondent is entitled to assign a striker to a different job other than the one to which the striker is otherwise entitled, because of speculation about what the striker might do, even as an agent of the Union, I find that Respondent has failed to meet its burden to show that the Union's statements were maliciously false. Indeed, as I understand the pending state court litigation, the issue in the libel action is essentially whether the Union acted maliciously in making the statements in question.

2. Delay in returning striking employees Shaw and Rosas to work

As already noted above, a series of letters were exchanged regarding Shaw and Rosas and culminating with a directive to the Union on September 30 that seasonal positions were available for them and that they should report for work at 6 a.m. on October 1 (G.C. Exhs. 13 and 14). Backing up, I note that on September 27, Hulteng wrote to Union Coun-

sel Absalom regarding the same two strikers, "In the event that seasonal positions open up, the Company proposes to contact the two employees directly to recall them for work. If you would prefer that we again go through you to communicate with these employees, just let me know." (G.C. Exh. 12.) On September 30, Brown wrote a letter via "fax" to Lucio Reyes, a union official, "Please advise Hector and Dorothy that we now have openings for them due to attrition and they have been scheduled to work in seasonal positions beginning Friday, October 1 at 6 a.m." (G.C. Exh. 13.) On the same day Respondent Attorney Leinwand also wrote a letter via "fax" to Reyes restating the information in Brown's letter recited above and adding "Because these strikers have elected to communicate through you, we are responding to you rather than to the strikers directly." (G.C. Exh. 14.)

Neither Shaw nor Rosas was notified to report for work on October 1 and neither did so report. Shaw was originally told by Linda Geisler, a striker then working for the Union, in a telephone call on October 2 at 8:30 p.m., to report for work on October 3 at 1 p.m. Then Geisler called back and said don't report for work until October 4, which Shaw did.

In analyzing this issue, I begin with my credibility finding already stated above, that Freitas told Brown and Heinze on September 20 that he desired all communications between the Employer and returning strikers to go through the Union. This is consistent with a principal-agency relationship between the Union and returning strikers which I have also found above. Having said this, I cannot account for Hulteng's statement in his letter to Absalom which I quoted above, other than to note that Hulteng was not present when Freitas made his statement to Brown and Heinze. Nor can I explain why the Union failed to object to Hulteng's statement. Nevertheless, I also note that Reyes, to whom Brown and Leinwand sent their "faxes" as recited above, although present for all or most of the hearing (Tr. 44), was never called as a witness. In sum, I find that any delay in having Shaw and Rosas report to work was the fault of the Union and not the Respondent. By going through the Union the Respondent was merely acceding to the wishes of Freitas. Accordingly, I will recommend that this allegation be dismissed.

3. The alleged assault on a union agent

A union organizer named Paula Macchello testified that on or about September 29, about 8 p.m., she was on a Respondent-approved tour of the plant for the two-fold purpose of campaigning for the Union and of observing the Employer's campaign signs and other indicia of its campaign inside the plant to defeat the Union in the approaching election. While wearing apparel and insignia clearly identifying her as a union supporter and/or union agent and while in the company of several other people including two strikers named Granger and Malanca who did not testify, another union representative named Anton Hinrichsen, who did testify, and the delegation's management escort, Greg Gorang, who also testified, Macchello claims that an employee swung a flat piece of cardboard at her narrowly missing her but brushing her clothing. For a number of different reasons, I do not credit Macchello's testimony.

To begin, I note some confusion over whether this incident allegedly occurred on September 28 or 29. This issue is of

no interest to me and I dismiss it as a factor in judging Macchello's credibility. Of greater import to me is her reaction to this alleged assault. She testified that she looked in the direction of Gorang and while mouthing the words, "What's this!" shrugged her shoulders. Gorang, Respondent's director of night operations, testified that at the time and place in question, he neither saw the assault nor Macchello's alleged reaction to it. There is no mention of the incident in any of Gorang's notes (R. Exhs. 14, 15).

All agree that later during the tour, and after the tour ended, Macchello neither mentioned the incident to Gorang, nor attempted to identify her alleged attacker. I find Macchello to be an assertive, confident woman who has worked as an organizer for the Teamsters for 18 months. She was no shrinking violet. Her behavior after the alleged incident is not consistent with the outrage I would expect from a union representative under the circumstances.¹³

The Union called Hinrichsen, a former Respondent employee for over 10 years before the strike and now a union representative since January. Although present with Macchello on the plant tour, Hinrichsen did not corroborate her testimony nor provide any testimony at all on the issue. As noted above, the other strikers on the tour were not called as witnesses. The two to five other workers working with or near the alleged assailant were, like the assailant himself, never identified and obviously never called as witnesses.

In light of the above, one searches the record for some degree of corroboration. Macchello testified there was corroboration in the form of her personal notes in which, she dutifully recorded the incident in question, the very night it happened. However, Macchello testified that despite her best efforts, she couldn't find her notes—none of them. For the reasons reflected above, I don't believe Macchello and I will recommend that this allegation be dismissed.¹⁴

4. The reprimand of Kussair

The General Counsel has alleged in the complaint that Kussair's reprimand of October 1 (G.C. Exh. 17) violated the Act. One searches the General Counsel's brief in vain for any discussion of this issue. As I understand the General Counsel's theory, it derives from the earlier claim that Kussair was unlawfully placed in a job in grower's inspection. I have rejected that theory. I also credit the testimony of Kussair's supervisor, Whiteman, that she warned him three times after he returned to work that he was not making the production quota which all other workers in that job were required to make. After the third warning, Kussair protested "in her face" and Whiteman called Brown for assistance. He told Kussair flatly that his insubordination would not be tolerated and he issued the written reprimand.

I also credit the testimony of Heinze in two particulars. First, I find that on or about October 6, Kussair requested a transfer to a loader position, and Respondent agreed to the transfer, but that Kussair returned to the strike before the job switch could be made. I also credit Heinze regarding why

¹³ Macchello testified that after the incident she made a verbal report to the Union, to those who were accompanying her and to others, but she can't recall the names of anyone (Tr. 90).

¹⁴ In light of my conclusion, it would unnecessarily prolong this segment to recite the conflicts between Macchello's testimony and her declaration to the Board.

Kussair was not given a loader job in the first place. The job requires lifting heavy bags or cases of walnuts off the line and stacking them on pallets, the lifting and stacking of bags into a truck and/or the performance of heavy cleanup work. This position is frequently available because the work is heavy and unpopular and leads to the greatest number of complaints to Respondent's human resources department. I find that work as measured by any objective scale is more onerous and less desirable than work in Respondent's grower's inspection department. Compare *Wellstream Corp.*, 313 NLRB 698, 705-706 (1994).

For the reasons stated above, I will recommend that this allegation has been unproven and should be dismissed.

5. The objections

I begin with a statement of relevant Board law.

"[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees." *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974); see also *NLRB v. First Union Management*, 777 F.2d 330, 336 (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB v. USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973)). See also *Colquest Energy v. NLRB*, 965 F.2d 116 (6th Cir. 1992). In sum, representation elections are not lightly set aside. *Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973). In *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994), the court stated,

while the Board "aspires to 'laboratory conditions' in elections," it is clear that "clinical asepsis is an unattainable goal in the real world of union organizational efforts." Indeed, "exaggerations, hyperbole, and appeals to emotions are the stuff of which election campaigns are made." *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 379 (4th Cir. 1968) (en banc). And while "[c]oercive conduct is never condoned during the election process . . . the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible." [Citation omitted, supra at 595.]

With the above as an introduction, I turn to the objections in issue.

Objections 2 and 4

(2) The Employer through its supervisors, agents, representatives and/or known sympathizers interfered with the fair operation of the election process and the necessary laboratory conditions by encouraging and condoning an atmosphere of fear and intimidation for union sympathizers . . . and (4) by making threats of reprisal and/or physical harm to employees who voted

for the Union and/or by failing to take reasonable and appropriate actions to discourage and deter such conduct.

At page 14 of its brief, the Union asserts that the testimony of Macchello, an agent of the Union, was offered in support of both objections. I have discredited Macchello's testimony insofar as it suggested that Respondent's employee attempted to strike her with a cardboard box. As to other portions of her testimony, Respondent does not dispute it.

On or about September 29, while on the same plant tour previously described, Macchello observed a man walking toward her near the plant cafeteria. He was wearing a T-shirt with the legend "Choke A Striker Vote No" and a white hard hat with the name Dimas printed on it. Macchello testified that in some unspecified way, she brought the T-shirt to Brown's attention. Brown denied ever seeing an employee wearing such a T-shirt and denied Macchello brought the matter to his attention. I credit Brown on this point because there would have been no reason to ignore the Union's protest of such a T-shirt. In addition, I note that Macchello again failed to produce her personal notes of this incident to corroborate her testimony.

Hinrichsen saw the same man wearing the same T-shirt on two occasions. On one of these occasions, Respondent's vice president, Dan O'Connell, was present but Hinrichsen did not bring the matter to his attention, because "There might be room for objections of that person wearing that shirt during the pre-election procedure." In other words, Hinrichsen felt that the best way to preserve the Union's right to objection later was not to bring the T-shirt to O'Connell's immediate attention (Tr. 369).

Respondent produced a witness at hearing named David Dimas. A Respondent year-round employee for 2 years, Dimas currently works as a spray booth operator in the canner department. Dimas testified that at his own expense, he had three T-shirts made up with the legend on the front as described by Macchello. Nothing was printed on the back. He further testified that he was wearing the T-shirt at the times and place described by Macchello and Hinrichsen. He also testified that when he encountered Macchello, she said to him, "You think you're hot shit with that shirt." To this Dimas made no reply.

On September 21, Respondent issued a memo to all employees from O'Connell, which reads as follows:

DATE: September 21, 1993
TO: All Employees
FROM: D. O'Connell
SUBJECT: *Strikers*

The Teamsters Union has told us that a small group of strikers want to come into work during the season. The Union has told us that these strikers will be trying to convince employees to support the Union in the upcoming election.

The law protects the rights of all employees to fully participate in an election campaign. Employees who are for the Union have the same rights as employees who are against the Union. Everyone is free to express their views.

As a reminder, it is against Company policy for any employee to engage in physical or verbal attacks or in-

timidation of other employees at work. Also, all campaign activities and discussions must take place during nonworking time, like breaks and the lunch hour.

Within these guidelines, we encourage all employees to express their views, either for or against the Union. Thank you.

[R. Exh. 7.]

Dimas was aware of the memo and felt that the T-shirts he had made up violated the policy. However, he decided to wear the T-shirts to the plant on two occasions as a joke. He wore the shirt during his entire shift and it was not covered up. No one from management observed him wearing the T-shirt, to Dimas' knowledge.

At page 17 of its brief, the Union states "we acknowledge that the record does not show that [Macchello's assailant] nor David Dimas . . . did so at the behest of the Employer." To this, I will add that Respondent took reasonable measures to confiscate replacement workers' campaign signs posted in and around the plant which were inflammatory and which management was aware of. In addition, O'Connell, Brown, and Heinze talked to certain replacement workers, including a leader of the antiunion campaign, Respondent machine operator Sonja Bubeck, who testified for Respondent. While the primary purpose of Bubeck's testimony was to establish the tension and resentment among the replacement workers in reaction to the returning strikers (evidence to which I assign little weight). I also note that Respondent's managers talked to Bubeck and other employees to explain that the returning strikers had a right to return to the plant, that they would be allowed to campaign on behalf of the Union during nonwork time, and that the replacement workers should "cool it."

The Union continues at page 17 of its brief to contend that the relevant evidence should be evaluated under the standard for third party conduct articulated in *Westwood Horizon Hotel*, 270 NLRB 802 (1984). For me, only the Dimas' T-shirt is in issue, and Dimas' conduct must be measured against the applicable standard, whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal. *Westwood Horizons Hotel*, supra at 803. In *Q.B. Rebuilders*, 312 NLRB 1141, 1142 (1993), the Board provided additional guidance for evaluating third-party conduct: "the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out; and whether it is likely that the employees acted in fear of [that person's] capability of carrying out the threat; and whether the threat was 'rejuvenated' at or near the time of the election." Cf. *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982).

I find that the wearing of the T-shirt in question was isolated and not condoned by Respondent's management, and could not possibly have created a general atmosphere of fear and reprisal. There is no credible evidence that any supervisor saw Dimas wearing the shirt, no evidence at all that any striker or replacement worker saw Dimas wearing the shirt and at least one of the paid union agents who observed the shirt made a calculated decision to remain mute so as to garner possible benefits later on. Finally, I credit Dimas that he wore the T-shirt as a joke—albeit I find that it was a bad joke. If anyone did see him wearing the T-shirt, no one could

seriously or reasonably believe that Dimas had the capability of carrying out the threat, such as it was. In light of the above, I will recommend that Objections 2 and 4 be overruled.

Objection 8

The Employer through its supervisors, agents, and/or representatives interfered with the fair operation of the election process and the necessary laboratory conditions by giving gifts, and/or making promises of benefits to employees.

In support of this objection, the Union presented a witness named Gricelda Contreras, Respondent's employee since 1979 assigned to the cannery department and a striker from the beginning. This witness gave testimony relating to an alleged conversation between herself and an unidentified Caucasian female driving an automobile, about 4 or 4:30 p.m., about 3 to 4 days before the election. According to Contreras, the person made certain statements in conclusionary terms about what the employer was allegedly doing to persuade replacement workers to support the employer in the election. When Contreras finished her direct testimony, Respondent moved to strike on the grounds of hearsay testimony and no proper foundation. In response to my inquiry, the Union candidly represented that it had no evidence to show that the declarant, that is, the female driver, was a replacement worker or had any other connection to Respondent. I struck the testimony from the record and reaffirm that decision here. Accordingly, I will recommend that Objection 8 be overruled.

Objection 11

The Employer through its supervisors, agents and/or representatives interfered with the fair operation of the election process and the necessary laboratory conditions by assigning employees who were avowed Union sympathizers to more onerous jobs and isolating them from other employees, thereby inhibiting their right to communicate with other employees regarding campaign matters.

At pages 2–3 of its brief, the Union states "the evidence relating to Objection No. 11 is the same as that which supports the 8(a)(3) allegations . . . we join in [General Counsel's] analysis of the record evidence and adopt it as support for Objection No. 11." I have found General Counsel's allegation lacking in merit and have recommended above, that they be dismissed. Accordingly, I will recommend that Objection 11 be similarly dismissed.

CONCLUSIONS OF LAW

1. Respondent, Diamond Walnut Growers, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Cannery Workers, Processors, Warehousemen & Helpers Union, Local 601, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

4. The objections of the election are all without merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

It is ordered that the complaint be, and is, dismissed in its entirety.

IT IS FURTHER ORDERED that the Union's Objections 2, 4, 8, and 11 to the election conducted in Case 32-RC-3553 are dismissed.